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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-494

STATISTICAL TABULATING CORPORATION,
Petitioner,

v.

DAVID K. HAMISTER AND DAVID J. NORMANT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents sold a computer system to the Petitioner. Paragraph six of the agreement of conveyance specifically and expressly limited the Petitioner's use of the system to the United States of America with the following language:

> During the term of this agreement COINS hereby grants to STC the exclusive right within the United States of America to use the COINS system...At the expiration of the term of this agreement, STC shall continue to have said exclusive right to use the COINS System. (emphasis added) (See Memorandum and Order at Petition Appendix B.)

The issue of law submitted separately to the District Court was whether the Petitioner had violated the Agreement by using the system outside the United States of America.

Upon examination of the subject Agreement and consideration of the authorities cited by the parties, the District Court found that Respondents had indeed clearly and unambiguously limited the Petitioner's use of the system to the United States of America. (See Memorandum and Opinion at Petition Appendix B.) Petitioner was found to have violated the Agreement by use outside the United States and the matter was set for trial as to damages.

At the trial as to damages the Petitioner attempted to demonstrate that its profit from use of the system outside the United States was less than its gross receipts. This was attempted through the testimony of only one witness who, upon cross-examination and examination by the Court, demonstrated that he was totally incompetent to testify to these matters. The District Court summarized his testimony as follows:

> On direct examination, Dalton testified as to certain costs and expenses which he had calculated to be directly attributable to performing the contracts with Clark International and Orenda Ltd. On cross-examination, however, it became apparent to this Court that Dalton's testimony was solely based upon 'estimates of my best recollections of what was involved.' Furthermore, upon questioning

by the Court, Dalton was unable to distinguish 'actual costs' and 'standard costs', terms which were used frequently throughout his testimony on both direct and cross-examination. Moreover, when asked on cross-examination what actual costs were paid by STC in connection with the performance of these contracts, Dalton answered that the 'company actually paid people (employees) as do all companies.' The incompetence of the witness was further demonstrated when, in reply to the question seeking to discover upon what basis the costs attributed to computer time were founded, he replied that he did not know what his company's actual cost would be. Instead, he testified, that he based his calculations on 'what it would cost me to go across the street and rent a computer.' (See Memorandum, Opinion and Order at Petition Appendix C.)

The District Court found that there was no competent evidence presented by Petitioner to establish deductions from the gross receipts and rendered judgment accordingly:

> Plaintiffs have made a complete showing of damages and defendant sought to rebut that evidence with testimony admittedly based wholly on conjecture. Thus, the Court hereby awards plaintiffs $60,000 representing the revenues received by defendant pursuant to the Clark International trans-

> action and $8,443.75 plus any other amounts which may be received by defendant or which have already been received after February, 1977 (the date of the last entry on defendant's amended Exhibit 3) pursuant to the Orenda Ltd. transaction together with interest, to be calculated at 6% per annum from the dates of the defendant's receipt of the revenues from each transaction. (See Memorandum, Opinion and Order at Petition Appendix C.)

In one portion of an assignment of error in the Court of Appeals relating to liability, Petitioner stated, among other things, that there should have been some sort of reservation of rights by Respondents in the Agreement. The Court of Appeals rejected that assignment of error and affirmed the decision of the District Court for the reasons stated by the court in its opinion. (See Order at Petition Appendix A.)

In an assignment of error in the Court of Appeals relating to damages, in one of the paragraphs of the Argument, Petitioner asked the court to "note" that Respondents should be deemed to have somehow waived any objection to the uncertain, speculative and conjectural testimony which was demonstrated to be incompetent during cross-examination. Again, the Court of Appeals rejected that assignment of error and affirmed the judgment for the reasons stated by the District Court. (See Order at Petition Appendix A.)

ARGUMENT

1. THERE WAS NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioner raised several assignments of error in the Court of Appeals. In support of each assignment of error Petitioner raised numerous points, considerations and comments. Each assignment of error was rejected by the Court of Appeals "for the reasons set forth in the opinions of (the) District Judge." (See Order at Petition Appendix A.) Petitioner has now scavenged through his appellate brief and has been able to find only two obscure items, which because they were not raised in the trial court, were not dealt with in the District Court Opinions approved by the Court of Appeals.

In its argument to this Court Petitioner has conveniently overlooked the fact that the Court of Appeals has no duty whatsoever to rule upon alleged errors not raised below. McGrath v. Manufacturer's Trust Co., 338 U.S. 241 (1949); Public Service Commission v. Havemeyer, 296 U.S. 506 (1936); Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 (1936). Since the alleged "errors" were not preserved in the trial court, the Court of Appeals quite properly chose not to specifically respond to them.

The well-reasoned opinions of the District Court dealt with and disposed of all arguments raised in that court which were again raised in the Court of Appeals. To the extent that the "error"

was preserved below, the Court of Appeals ruled upon all contentions made in the Assignment of Error by adopting the opinions of the District Court. Certainly the Court of Appeals has not "completely failed to perform its function" in "such a departure from the accepted course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision", as claimed by Petitioner.

2. THE TRIAL JUDGE WOULD HAVE COMMITTED A GROSS ERROR HAD HE NOT REJECTED THE SUBJECT TESTIMONY

The second proposal which Petitioner makes to this Court is that the trier of the facts must accept as fact all testimony given in direct examination which is not objected to, even though, as was the case here, the testimony is demonstrated to be totally incompetent upon cross-examination and examination by the Court. This is absurd. (See City National Bank v. Nelson (1928), 218 Ala. 90, excluding testimony demonstrated to be incompetent upon cross-examination.)

Petitioner failed in its burden of proof by only submitting the testimony of a witness who admitted that he did not know what he was talking about and that his direct testimony was based, at best, upon speculation and conjecture. The District Court would clearly have been in error had it accepted that testimony. Petitioner would have this Court remove from the trier of the law the duty of determining the competency of evidence and further would have this Court remove from the trier of the facts the right to pass upon the credibility

of the witnesses. This is contrary to the basic concept and traditions of our system of justice. Chandler v. Von Roeder, 65 U.S. (24 How.) 224 (1860); Bowling v. Harrison, 6 (How.) U.S. 248 (1847).

CONCLUSION

Rule 19 of the Rules of this Court outlines the considerations of the Supreme Court in ruling upon a Petition for a writ of certiorari. None of those considerations is present here. It is significant to note that Petitioner has not complied with Rule 40(1)(C) for the very reason that there are no "constitutional provisions, treaties, statutes, ordinances or regulations" involved here. Furthermore, there are no special and important reasons here; no constitutional issues have been raised here; no federal question has been raised here; this decision is not in conflict with the decision of another Court of Appeals; no state or territorial question is involved here; no federal question has been decided here; there has been no departure from the accepted and usual course of judicial proceedings.

The Petition should be summarily denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition was served, pursuant to Rule 33(1) of the Rules of the United States Supreme Court, upon George W. Hamman, 130 East Randolph Street, Suite 2110, Chicago, Illinois 60601, Counsel for Petitioner, by depositing same in the United States mail, first class postage prepaid, on this 22nd day of October, 1979.

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